

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

KEITH JENKINS,	:	
Petitioner,	:	
	:	
v.	:	PRISONER
	:	Case No. 3:99 CV 2556 (CFD)
	:	
STATE OF CONNECTICUT, et al.,	:	
Respondents	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Keith Jenkins, an inmate confined at the State of Connecticut Enfield Correctional Institution, brings this action pro se for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is STAYED.

I. Background

In 1989, the petitioner was tried before a jury in the Connecticut Superior Court for the Judicial District of Hartford-New Britain at Hartford. On November 7, 1989, the jury found him guilty of interference with a search warrant in violation of Connecticut General Statute § 54-33d, risk of injury to a minor in violation of Connecticut General Statute § 53-21, and reckless endangerment in the first degree in violation of Connecticut General Statute § 53a-63. These charges arose from an incident on July 26, 1988, when Hartford police officers attempted to execute a search warrant for narcotics and weapons at an apartment. The defendant was accused of preventing the officers from entering the apartment and essentially holding a two year old child hostage.

On December 12, 1989, the trial court sentenced the petitioner to a total effective sentence of twenty years of imprisonment. On April 2, 1991, the Appellate Court of Connecticut affirmed the judgment on direct appeal. See State v. Jenkins, 588 A.2d 648, 651 (Conn. App.

1991). On May 17, 1991, the Connecticut Supreme Court denied the petitioner's request for certification to appeal from the decision of the Appellate Court. See State v. Jenkins, 593 A.2d 132 (Conn. 1991).

In 1992, the petitioner filed a state petition for writ of habeas corpus, arguing that he had been denied effective assistance of counsel at trial and on appeal. On November 17, 1994, the Connecticut Superior Court granted the petition and ordered that the petitioner be discharged. See Jenkins v. Warden, No. 921371, 1997 WL 728943 (Conn. Super. Ct. Nov. 14, 1997). The State of Connecticut appealed the decision. On March 23, 1999, the Appellate Court of Connecticut reversed the habeas corpus judgment of the Superior Court and reinstated the conviction. See Jenkins v. Commissioner of Correction, 726 A.2d 657, 669 (Conn. App. 1997). On June 16, 1999, the Connecticut Supreme Court denied the petitioner's request for certification to appeal from that decision of the Appellate Court. See Jenkins v. Commissioner of Correction, 733 A.2d 233 (Conn. 1999).

The petitioner filed the present petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 on December 28, 1999.

II Discussion

In support of his petition for federal habeas corpus relief, Jenkins claims that he was afforded ineffective assistance of counsel during his state criminal trial. Specifically, he contends that trial counsel failed to (1) interview and subpoena potential witnesses, and (2) object to the prosecutor's improper references to Jenkins' criminal record at summation, and (3) object to the prosecutor's improper comments at summation about the credibility of certain witnesses. The respondent (hereinafter "State") argues that Jenkins has only raised the first two grounds in his

petition here and has failed to exhaust his state court remedies; thus, his petition should be dismissed.

Because of the importance of tracking the various issues for the purpose of examining whether they have been “exhausted,” the procedural history of this case will be detailed and, at times, repeated.

A prerequisite to habeas relief under § 2254 is the exhaustion of all available state remedies. See O’Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Rose v. Lundy, 455 U.S. 509, 510 (1982); Daye v. Attorney General of the State of New York, 696 F.2d 186, 190 (2d Cir. 1982), cert. denied, 464 U.S. 1048 (1982); 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is not jurisdictional; rather, it is a matter of federal-state comity. See Wilwording v. Swenson, 404 U.S. 249, 250 (1971) (per curiam). The exhaustion doctrine is designed not to frustrate relief in the federal courts, but rather to give the state court an opportunity to correct any errors in the state criminal process. See id. Ordinarily, the exhaustion requirement has been satisfied if the federal issue has been properly and fairly presented to the highest state court either by collateral attack or direct appeal. See O’Sullivan, 526 U.S. at 843. “[T]he exhaustion requirement mandates that federal claims be presented to the highest court of the pertinent state before a federal court may consider the petition.” Pesina v. Johnson, 913 F.2d 53, 54 (2d Cir. 1990).

The Second Circuit requires the district court to conduct a two-part inquiry as to exhaustion. First, the petitioner must have raised before an appropriate state trial court any claim that he asserts in a federal habeas petition. Second, he must “utilize[] all available mechanisms to secure appellate review of the denial of that claim.” Lloyd v. Walker, 771 F. Supp. 570, 573

(E.D.N.Y. 1991) (citing Wilson v. Harris, 595 F.2d 101, 102 (2d Cir. 1979)).

Here, the exhaustion inquiry is limited to an examination of Jenkins' state habeas corpus proceedings, as he makes no claim that the issues here were exhausted at his criminal trial and the direct appeal of that judgment.

1. Superior Court Habeas Petition

Jenkins raised three grounds as part of his ineffective assistance of counsel claim in his habeas petition before the Connecticut Superior Court. He argued that: (1) trial counsel failed to interview and call at trial certain witnesses who would have offered exculpatory evidence on his behalf; (2) trial counsel failed to object to the prosecutor's: (a) references to Jenkins' criminal record at summation, (b) comments during summation concerning the credibility of certain witnesses, and (c) comments during summation concerning the role of the prosecutor's office in prosecuting claims of excessive police force; and (3) appellate counsel (on the direct appeal) failed to raise the issue of prosecutorial misconduct. As to the first ground, the Superior Court determined that Jenkins had failed to demonstrate prejudice as a result of counsel's failure to interview and call certain witnesses, and thus ruled against Jenkins on that issue. As to the second ground, however, the Superior Court determined that trial counsel's performance was deficient because counsel failed to object to the prosecutor's comments in those three respects.¹ The Superior Court also concluded that Jenkins was prejudiced by the deficient performance of trial counsel and, accordingly, granted Jenkins' habeas petition.

¹The Superior Court found it unnecessary to decide the issue of the performance of appellate counsel because the court granted the petition on the ground that trial counsel was ineffective.

2. Appeal of Superior Court Decision

On appeal to the Connecticut Appellate Court, the State argued that the Superior Court erred in: (1) refusing to apply the Strickland v. Washington, 466 U.S. 688 (1984), presumption that counsel's acts and omissions constitute reasonable tactical decisions; (2) finding that trial counsel's performance was deficient for failing to object to the prosecutor's comments during summation and (3) finding that Jenkins suffered prejudice as a result of trial counsel's failure to object to the prosecutor's comments. Jenkins did not file any cross-appeal in the Appellate Court regarding the Superior Court's decision that he suffered no prejudice from trial counsel's failure to interview and call certain witnesses.²

The Appellate Court held that the Superior Court had properly considered the presumption in Strickland. However, the Appellate Court found that the Superior Court improperly found that trial counsel's performance was deficient in failing to object to the prosecutor's comments during summation. Additionally, the Appellate Court concluded that it need not address Jenkins' claim that he suffered prejudice because it had determined that counsel's performance was not deficient. The Appellate Court reversed and reinstated the judgment of conviction.

3. Petition to the Connecticut Supreme Court

Jenkins filed a petition for certification with the Connecticut Supreme Court seeking to appeal the decision of the Appellate Court. In his petition for certification, Jenkins sought review only of that portion of the Appellate Court's decision that trial counsel's performance was not

²Although Jenkins is proceeding pro se here, he was represented by counsel during his state habeas proceedings.

deficient in failing to object to the prosecutor's (a) comments concerning the credibility of witnesses, and (b) comments concerning the role of the prosecutor's office in prosecuting claims of excessive police force. He did not raise in his petition the issue concerning comments about his criminal record. The Connecticut Supreme Court denied Jenkins' petition for certification to appeal from the decision of the Appellate Court.

4. Federal Habeas Petition

In his federal habeas petition, Jenkins raises three grounds in favor of his ineffective assistance of counsel claim. He argues that trial counsel failed to (1) interview and subpoena potential witnesses and (2) object to the prosecutor's comments about Jenkins' criminal record. Additionally, notwithstanding the State's arguments that these two grounds were the only ones raised by Jenkins in his federal habeas petition, the Court finds that Jenkins also argues in his federal petition that his trial counsel failed to object to the prosecutor's comments concerning the credibility of witnesses. See Pet'r's Mem. Supp. § 2254 Mtn. at 6 ("Further, the record shows the prosecutor utilized the closing argument to express his personal views . . .").³

As to trial counsel's failure to interview and subpoena potential witnesses, Jenkins did not appeal the Superior Court's rejection of this ground, either in a cross-appeal filed with the Appellate Court or in his petition for certification to the Connecticut Supreme Court. As to the ground that trial counsel failed to object to the prosecutor's comments concerning Jenkins' criminal record, Jenkins did not raise this ground in the petition for certification to the

³While such argument is located in Jenkins' memorandum in support of his habeas petition rather than in the petition itself, the memorandum was filed on the same date as the petition, and a Court must construe the pleadings of a *pro se* habeas petitioner liberally. See Haines v. Kerner, 404 U.S. 519 (1972) (per curiam) (maintaining that the sufficiency of habeas corpus petitions are held "to less stringent standards than formal pleadings drafted by lawyers").

Connecticut Supreme Court. Thus, Jenkins has not exhausted his state court remedies with respect to these two grounds, and thus, they are DISMISSED.

However, Jenkins did raise, in his petition for certification to the Connecticut Supreme Court, his claim that trial counsel failed to object to the prosecutor's comments concerning the credibility of defense witnesses. The Connecticut Supreme Court denied the petition for certification containing this claim. Thus, this ground has been exhausted.

Because Jenkins has set forth both unexhausted and exhausted claims in his federal habeas petition, he presents a "mixed petition." See Zarvela v. Artuz, 254 F.3d 374, 378 (2d. Cir. 2001). The Second Circuit has stated that when a mixed habeas petition is presented, a stay of the exhausted claims and a dismissal of the unexhausted claims is appropriate when an outright dismissal of the entire petition could jeopardize the timeliness of a collateral attack. See id. at 379-80 (citing Duncan v. Walker, 121 S.Ct. 2120, 2130 (June 18, 2001) (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment) ("[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed there is every reason to do so when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period.")). Here, because a dismissal of Jenkins' mixed petition risks the loss of both his exhausted and unexhausted claims because the limitations period will likely expire during the time taken to initiate state court exhaustion and return to federal court after exhaustion is completed,⁴ a stay of the petition is appropriate as to the exhausted claim. See id.

⁴The Court notes that, under Title I of the AEDPA, Jenkins has one year after the date his conviction became final in which to file a federal habeas petition. 28 U.S.C. § 2244(d)(1) (the limitations period begins to "run from . . . the date on which the judgment became final by the

However, recognizing possible concerns about delays in seeking exhaustion and in returning to federal court after exhaustion, the Second Circuit provides that such a stay should be conditioned on Jenkins' initiation of exhaustion of his state remedies on his unexhausted claims within a reasonable amount of time after this decision and his return to the District Court within a reasonable time after exhaustion is completed.⁵ See id. at 381.

III. Conclusion

For the foregoing reasons, the instant petition for a writ of habeas corpus [Document #2] is hereby STAYED with regard to the exhausted claim, conditioned on Jenkins' initiation of exhaustion of his state remedies on his unexhausted claims within 30 days and his return to the

conclusion of direct review or the expiration of the time for seeking such review"); see also Williams v. Artuz, 237 F.3d 147, 151 (2d Cir. 2001) (one-year statute of limitations set forth in § 2244(d)(1)(A) begins to run only after "the completion of direct appellate review in the state court system and either the completion of certiorari proceedings in the United States Supreme Court, or—if the prisoner elects not to file a petition for certiorari—the time to seek direct review via certiorari has expired"). However, a petitioner whose conviction became final prior to the AEDPA's effective date of April 24, 1996, has a one-year grace period after April 24, 1996 in which to file a first habeas petition. Ross v. Artuz, 150 F.3d 97, 102-03 (2d Cir. 1998). Additionally, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the limitations period. 28 U.S.C. § 2244(d)(2); Bennett v. Artuz, 199 F.3d 116, 118-19 (2d Cir. 1999), aff'd, 531 U.S. 4 (2000). Further, under appropriate circumstances, the limitations period is subject to equitable tolling. See Smith v. Mc. Ginniss, 208 F.3d 13, 17 (2d Cir. 2000). The filing of this present federal habeas petition, however, does not toll the limitations period. See Duncan, 121 S.Ct. 2120 (holding that application for federal habeas review is not an "application for State post-conviction or other collateral review," within meaning of tolling provision of the AEDPA); Neversen v. Bissonnette, 261 F.3d 120, 125-126 (2d Cir. 2001) (holding that AEDPA limitations period was not tolled during the pendency of petitioner's earlier, federal habeas corpus petition).

⁵It may be that the limitations period has already expired on Jenkins' unexhausted claims, in which case Jenkins' attempt to exhaust would be futile. The Court presently takes no position on that issue, as it has not been briefed by the parties.

District Court after exhaustion is completed within 30 days.⁶ The petitioner is also ordered to notify the Court within the initial 30 day period if he has initiated exhaustion of his state remedies on the two unexhausted claims.⁷

SO ORDERED this _____ day of November 2001, at Hartford, Connecticut.

CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

⁶If either condition is not met, the Second Circuit provides that the stay may later be vacated *nunc pro tunc* as of the date the stay was entered, and the petition, no longer a mixed petition because the unexhausted claims have been dismissed, may then proceed on the exhausted claim. See Zarvela 254 F.3d at 381. If the conditions are met, and Jenkins wishes to pursue his newly exhausted claims, he must then file a motion to amend his petition to add such claims.

⁷Pursuant to Rule 2 of the Local Rules of Civil Procedure for the District of Connecticut, Jenkins must also notify the Court of his current address. At present, Jenkins' address is listed as a correctional facility in Georgia, and no change of address has been filed. The State has provided the Court with his address at the Enfield Correctional Institution, but that must be confirmed by Jenkins or the petition may be dismissed.